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ABSTRACT

This paper examines two recent attempts to enact state freedom of expression laws for public college and university students and discusses the prospects for such laws in the context of state scholastic freedom of expression laws covering high school journalists in six states. It examines the case of Kincaid v. Gibson, which decided that restriction on school-sponsored expression expounded in Hazelwood School District v. Kuhlmeier applies to college and university expression. Based on research questioning the effectiveness of those state scholastic freedom of expression laws, it appears to be unlikely that similar laws protecting the First Amendment rights of college students will be as effective as proponents might expect. (Contains 34 references.) (Author/RS)

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Freedom of Expression Laws and the College Press: Lessons Learned from the High Schools

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Freedom of Expression Laws and the College Press: Lessons Learned from the High Schools

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Abstract

This paper examines two recent attempts to enact state freedom of expression laws for public college and university students and discusses the prospects for such laws in the context of state scholastic freedom of expression laws in six states. Based on research questioning the effectiveness of those state scholastic freedom of expression laws, it appears to be unlikely that similar laws protecting the First Amendment rights of college students will be as effective as proponents might expect.

Freedom of Expression Laws and the College Press: Lessons Learned from the High Schools

When a U.S. District Court Judge applied the Hazelwood v. Kuhlmeier (1988) standard to college publications in Kentucky (Kincaid v. Gibson, 1997), a decision that is under review in the 6th U.S. Circuit Court of Appeals, many people associated with college media expressed concern that the ruling would curtail freedom of the press on college and university campuses ("Extending Hazelwood," 1996; "Hazelwood threatens," 1997; Paxton, 1998; "U.S. Court of Appeals throws out," 1999; "AEJMC decries," 1999). Although not directly linked to the Kentucky case, legislators in at least two states have begun efforts to enact state legislation that would guarantee that college students retain First Amendment rights. In Arkansas, such a bill was withdrawn from the House of Representatives after opposition from the Arkansas Press Association ("Ohio expression bill," 1999). In Ohio, the Legislature this Spring was considering a bill to guarantee that college students could not be punished for on-campus expression that would have been permissible off-campus (Ohlemacher, 2000).

Proponents of these efforts to ensure First Amendment rights for college and university students, however, might do well to examine the outcome of similar freedom of expression laws for the high school press. In the wake of the Hazelwood ruling and the outcry over censorship of the student press, four states enacted state freedom of expression laws covering high school journalists: Arkansas (Arkansas Student Publications Act, 1995), Colorado (Rights of Free Expression for Public School Students, 1998), Iowa (Student Exercise of Free Expression, 1989), and Kansas (Student Publications, 1992). A fifth state, Massachusetts, amended its freedom of expression law (Right of Students to Freedom of Expression, 1974), following Hazelwood. A sixth

state, California, already had a freedom of expression law covering high school journalists when Hazelwood was decided (Student Exercise of Freedom of Speech and Press, 1983).

This study will examine the Kincaid case, then the effectiveness of the state high school freedom of expression laws and whether those laws have been effective in limiting restrictions on high school journalists.

Setting the Stage for Kincaid

While not directly involving freedom of the press issues and high school publications, two U.S. Supreme Court decisions appeared to solidify the fundamental First Amendment rights of free expression for students in public high schools. In the first case, Tinker v. Des Moines Independent School District (1969), the Supreme Court overturned the suspension of teen-aged students for wearing black armbands to class to demonstrate their opposition to the Vietnam war. The Court's decision, while noting that student expression disrupting classroom activity still could be banned, stated that expression that did not cause a disruption was protected by the First Amendment. "It can hardly be argued," the Court said, "that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (p. 507). Any doubt that this viewpoint could apply to higher education was put to rest in 1972 in Healy v. James, when the Court made it clear, while overturning Central Connecticut State College's refusal to recognize Students for a Democratic Society as an authorized campus association, that "state colleges and universities are not enclaves immune from the sweep of the First Amendment" (p. 180).

Despite these rulings, public college and university administrators have tried to control the content of student-run newspapers through a variety of means in the years since Tinker and Healy, and virtually all these methods have been ruled by the

courts to be an abridgment of First Amendment rights. In one such method, campus administrators have attempted to punish editors, either through firing, suspension or outright expulsion, as a penalty for printing "improper" or "indecent" material. In Trujillo v. Love (1971), the managing editor of the Southern Colorado State University student newspaper, The Arrow, was suspended from her job for attempting to publish an editorial cartoon criticizing the university president and for submitting to the paper's faculty adviser a proposed editorial criticizing a municipal judge. In ordering Dorothy Trujillo reinstated as managing editor, the District Court held that she had been improperly punished for exercising her right of free expression. The issue of punishing students for printing or attempting to print unpopular commentary reached the U.S. Supreme Court two years later in Papish v. Board of Curators of the University of Missouri, et al. (1973) when a graduate student at the University of Missouri was expelled for distributing on campus an underground newspaper that school officials said contained "indecent speech." In ordering the student's reinstatement, the per curiam decision said it was clear her expulsion was caused by the content of the newspaper. "We think Healy makes it clear that the mere dissemination of ideas -- no matter how offensive to good taste -- on a state university campus may not be shut off in the name alone of 'conventions of decency'" (p. 670).

A second administrative method of controlling student press content is through restriction of funding. Most student-run campus newspapers receive funding from several sources, including advertising revenues, subscription fees on- and/or off-campus, student fees (normally collected and distributed as part of the campus fees package) or general university funds (Tenhoff, 1991, p. 516). In several cases, campus administrators have tried to punish or otherwise control student newspapers by restricting the availability of student fees or other funding. In Joyner v. Whiting (1973), the president of North Carolina Central University, upset

over the editorial stance taken in the student-run Campus Echo, terminated the newspaper's financial support from the university and refunded to each student the pro rata share of activities fees that would have gone to the paper had funding continued. The court overturned the president's actions and ordered funding restored, ruling that while a state-funded university can't be forced to establish a campus newspaper, once one is established, school officials may discontinue funding only for reasons unrelated to the First Amendment: "If a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment" (p. 460). More recently, the Eighth Circuit Court of Appeals struck down an attempt by University of Minnesota Board of Regents to cut fees distributed to The Minnesota Daily (Stanley v. McGrath, 1983). In that case, school officials were infuriated by an issue of the campus newspaper that satirized religious, social and political figures and customs. In response, the Board of Regents imposed a new funding system that would allow any student to obtain a refund of the part of student fees that went to fund the newspaper. The appeals court, citing the precedent in Joyner v. Whiting and other cases, ruled that "A public university may not constitutionally take adverse action against a student newspaper, such as withdrawing or reducing the paper's funding, because it disapproves of the content of the paper" (p. 282).

While these cases involve overall funding of the student newspaper, Antonelli v. Hammond (1970) showed that administrators can't limit student newspapers by a one-time restriction of funding, either. In Antonelli, the District Court ruled that the Fitchburg State College president violated students' First Amendment protections when he refused funding for an issue of the campus newspaper, The Cycle, that he felt was obscene. The Court ruled that by refusing funding for the issue, the college president was restricting the flow of information to that solely approved of by an agent of the state government.

A third method of administrative control over student publication, perhaps more common, is through official university censors. In Antonelli, in addition to prohibiting the college president from cutting funding for the student-run newspaper, the District Court barred university officials from requiring that future issues of the publication be approved by an advisory board appointed by the school president. The Court noted that any direct prior restraint of expression, such as an advisory board with censorship powers, goes to the very heart of the First Amendment and faces a heavy presumption against its validity (p. 1335). In Trujillo, in addition to finding the suspension of the student newspaper managing editor to be unconstitutional, the District Court found that the appointment of a faculty adviser who was to rule before publication on "controversial" material was designed to "rein in" the student editor's expression and was therefore impermissible (p. 1271).

No courts, however, have ruled that student publication content is not subject to some legal regulation. In addition to restraints facing the news media at large, such as punishment for libel, obscenity, and invasion of privacy, student publications also are subject to the strictures contained in Tinker, which states that student expression may not materially and substantially interfere with appropriate school discipline and operation (p. 513).

In summary, until Kincaid v. Gibson, state universities or colleges and other government entities had been prohibited from exercising prior restraint or subsequent censorship of expression qualified for protection under the First Amendment. They also had to prove that there existed a compelling state interest in establishing reasonable regulations concerning expression not qualified for First Amendment protection. Any regulation of unprotected expression had to be reasonable, specific and clear, and it had to regulate the problem it was designed to address. These regulations cannot be vague, over-broad, over-severe, illegal or unconstitutional. As the Fourth Circuit Court of Appeals stated succinctly in Joyner:

> The principles reaffirmed in Healy have been extensively applied to strike down every form of censorship of student publications at state-supported institutions. Censorship of constitutionally protected expression cannot be imposed by suspending the editors, suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support, or asserting any other form of censorial oversight based on the institution's power of the purse. (p. 460)

While students at public colleges and universities were enjoying Court-sanctioned protection against censorship, student editors at public high schools didn't fare as well. In 1988's Hazelwood School District v. Kuhlmeier decision, the Supreme Court largely abandoned the Tinker decision holding that official censorship of student expression was unconstitutional unless the expression materially disrupted class work or caused substantial disorder (Tinker, p. 513).

In the Hazelwood case, students enrolled in a Journalism II course at Hazelwood East High School in Missouri attempted to publish an edition of the school newspaper containing two stories that the principal disliked. One was based on interviews with students (identified with pseudonyms) who had become pregnant. The principal contended the students still could be identified by other details in the story. The second article discussed the impact of divorce on some students. The principal said the article was unfair because the divorced parents were not contacted to give their side of the story.

The Hazelwood opinion, written by Justice White, found a difference between purely student expression, as in Tinker, and expression using a school name and resources, as did the high school newspaper at the heart of the case. The Court found a distinction between traditional public forums, such as sidewalks or street corners

where anyone can assemble and express opinions, and a student newspaper published as part of the curriculum and in which the public does not have a reasonable expectation of access. In the case of student publications produced as part of the curriculum, the Court said, educators can exercise editorial control over the "style and content" of school-sponsored student expression "as long as their actions are reasonably related to legitimate pedagogical concerns" (p. 571). Among those pedagogical concerns, the Hazelwood decision said, was "speech that is ... ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences" (p. 570).

Hazelwood meets Kincaid

The Hazelwood ruling concerned only student publications in secondary schools. But in an ominous footnote, the Court said in an aside that it need not decide at that point whether the same standards expounded in Hazelwood would apply to school-sponsored expression at the college and university level (p. 571). The U.S. District Court in Kincaid v. Gibson (1997) decided that Hazelwood did indeed apply to college and university expression.

The Kincaid case began over The Thorobred, the Kentucky State University student yearbook distributed every two years. In 1994, Kentucky State administrators refused to distribute the 1992-94 edition of the yearbook because of its content. Among the administration's complaints were that yearbook cover was printed in purple, not the school colors of yellow and green, and that instead of signifying it was from Kentucky State, the cover bore the legend "destination unknown." In addition, administrators said the yearbook did not appropriately identify all KSU students who were pictured and that the yearbook contained too much current event information unrelated to the KSU campus. Finally, administrators said the yearbook was late and the yearbook staff had exhausted most of its university-funded budget.

Two students -- one who paid the mandatory $80 student fee entitling him to a copy of the yearbook, the other Thorobred Editor Capri Cofer -- sued in U.S. District Court, alleging that the administrators' actions violated their First Amendment rights to freedom of speech by censoring the yearbook. On Nov. 15, 1997, U.S. District Judge Joseph Hood issued a summary judgment dismissing the students' complaints.[1]

In his ruling, Judge Hood acknowledged that well-established case law provides that the government can regulate speech in a public forum only if it has a narrow and compelling reason to do so. He also noted the 1973 Fifth Circuit Court of Appeals decision in Bazaar v. Fortune, in which the appeals court, overturning the administration's censorship of a student literary magazine at the University of Mississippi because of objections to the magazine's content, stated in dicta that it considered student publications such as newspapers and yearbooks to be public forums.

But Hood's decision also noted that the Supreme Court's Hazelwood decision specifically found that the school newspaper in that case was part of the curriculum and had never been intended to be a public forum; because the administration had not intended to open the pages of the paper to the public and instead was using it as an educational tool, administrative control over its content was permissible as long as it was reasonable. Hood also relied in part on a First Circuit Court of Appeals case involving a high school yearbook, Yeo v. Town of Lexington (1997). In that case, the appeals court found that the advertising pages of a high school yearbook and newspaper were a limited public forum because the school had made space available

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[1] In the same lawsuit, the two students claimed that university officials censored the student newspaper, The Thorobred News, by demoting the paper's adviser after the paper ran cartoons lampooning the administration and campus life. The students claimed the university's actions were censorship prohibited under Antonelli, but Hood disagreed, writing that the adviser had already been reinstated, no actual censorship of content occurred, and there was no First Amendment violation.

to outside advertisers.[2] Rather than follow the majority in Yeo, however, Hood focused on a dissent that argued that a high school yearbook is a mere compilation of photographs capturing people and events and is not usually a vehicle for expression of views.

In the Kentucky State case, Hood ruled Kentucky State had never intended The Thorobred to be a public forum because it was student publication prepared by students and distributed to students. Hood wrote, "The yearbook was not intended to be a journal of expression and communication in a public forum sense, but instead was intended to be a journal of the 'goings on' in a particular year at KSU." Because he ruled the yearbook to be a nonpublic forum, Hood ruled that Kentucky State administrators were entitled to exert control over the content of The Thorobred:

> It was reasonable for the administration to want the annual to explain who the students were in the pictures -- so that fifteen years from now, the students could look back and remember, for example, who the KSU homecoming queen was. Moreover, it was reasonable for the administration to want the yearbook to focus mainly on KSU.

Further citing Hazelwood, Hood ruled that KSU administrators would be justified in restricting expression that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or suitable for immature audiences." Because the Hazelwood decision is applicable to a college yearbook, Hood concluded, Kentucky State administrators did not violate the students' rights in refusing to distribute The Thorobred. Hood added, "The defendants, as overseers of KSU, and thus the yearbook, had the right to refuse/censor access to state property when that property did not reflect well on KSU."

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[2] The Yeo case focused not on administrative control of student publication content, but rather on whether a student newspaper and yearbook were acting as agents of the state when they refused to run a controversial advertisement.

Meanwhile, both the District Court and the Sixth Circuit Court of Appeals dismissed a lawsuit by Laura Cullen, Kentucky State University Coordinator of Student Publications, who was challenging the administration's decision to remove her as advisor to the student newspaper and to block distribution of the yearbook. The Sixth Circuit ruled her suit moot because Cullen had resigned from the university (Cullen et al. v. Gibson et al., 1997).

In 1999, a three-judge panel of the 6th Circuit Court of Appeals upheld on a 2-1 vote Hood's ruling in Kincaid v. Gibson (191 F. 3d. 719). Because the decision was vacated pending an en banc hearing (Kincaid v. Gibson, 197 F. 3d. 828, 1999), the 6th Circuit panel's opinion is unpublished. However, before the decision was vacated, copies of the decision and the dissent were distributed to the public on the Student Press Law Center's web site (www.splc.org), and both deserve a brief discussion.

In its 2-1 decision written by Judge Allen Norris, the panel agreed with Hood that the Hazelwood standard applied to the Kentucky State yearbook because the university had never established it as a public forum. The majority wrote that Kentucky State officials were within their authority to censor the yearbook and said that censorship was a reasonable attempt to maintain the university's "image to potential students, alumni, and the general public. In light of the undisputedly poor quality of the yearbook, it is also reasonable that KSU might cut its losses by refusing to distribute a university publication that might tarnish, rather than enhance, that image."

In a dissent, Judge R. Guy Cole pointed out that the Supreme Court's Hazelwood decision focused on the First Amendment in the context of a public high school, not in a university setting. Cole also disagreed with the majority's contention that the yearbook was not a public forum, arguing that it is instead a limited public forum, and that the university's expressed reasons for censoring the yearbook (inappropriate

theme, poor quality) are content-based and did not serve a compelling state interest as required in time, place and manner restrictions.

High School Expression Laws

Six states have freedom of expression laws specifically for high school students. Four states enacted their laws specifically to address the Hazelwood case -- Arkansas, Colorado, Iowa and Kansas. Massachusetts, amended its freedom of expression law following Hazelwood. A sixth state, California, already had a freedom of expression law covering high school journalists when Hazelwood was decided.

Few researchers have studied differences between high school student newspapers in those six "press law" states and the 44 other "non-press law" states. Just three studies have explored the issue.

Dickson and Paxton (1997) in a national survey of high school newspaper advisors found that advisors in states with freedom of the press laws specifically for high school students were not as likely to respond that the advisor is ultimately responsible for the content of the newspaper and not as likely to state that the advisor should correct factual inaccuracies in student copy.

In another national survey of high school newspaper advisors, Paxton and Dickson (2000) found that advisors in states with scholastic freedom of press laws and those in states without such laws are remarkably similar in their attitudes about scholastic press freedom and the way they exercise what they see as their duty in oversight over the newspaper. They also suggest that advisors' impressions about the amount of student self-censorship and the amount of conflict or controversy in the newspaper is remarkably similar in both types of states. The only actual differences they found in press law and non-press law states were due to differences in advisors' reports of prior review and prior restraint conducted by the principal. Principals in press law states are more likely to leave the newspaper alone and let the advisor run

it than is the case in non-press law, although it should be noted that even in press-law states, there were instances in which principals exerted control over student publications.

Paxton and Dickson (2000) also reported that it was clear from comments of a number of advisors in both press law and non-press law states that they see their role as a gatekeeper to stop unacceptable content from going into the newspaper. Their definitions of unacceptable content, however, range all the way from misspellings and poor grammar to inaccuracies of fact, invasion of privacy and libel, but not usually to subject matter of a story.

The only other reported study that specifically addresses issues concerning state press freedom laws was a one-state study by Plopper and Downs (1998). They found that "on occasion, the letter of the law clearly had been violated" in Arkansas (p. 82) following implementation of that state's student press law, and they found "a good deal of advisor ignorance related to content and implementation" of the law (p. 83). They found that some advisors were unaware of the state law. They also found that some advisors didn't pay much attention to the law. Third, they found that advisors appeared to have differing interpretations of what their state law meant.

Combined, these studies indicate that state freedom of expression laws have not been a panacea for high school students facing restrictions on expression, even though the state has a statute ensuring First Amendment freedoms.

Implications for College Freedom of Expression Laws

In March 2000, the sponsors of a bill that would have guaranteed that students attending Arkansas public colleges and universities have free expression rights withdrew the measure when it drew opposition from the Arkansas Press Association ("Ohio free expression bill," 1999). The bill introduced in the Arkansas House contained several provisions: it would have guaranteed freedom of expression for

public college students as long as that expression was not disruptive; it would have ensured that student expression was not deemed a reflection of school policy, and it would have stated that school officials could not have been held accountable for student expression. The Arkansas Press Association objected to the bill's guarantee of "unlimited" free expression rights for college students, arguing that other journalists face restrictions such as obscenity and libel, and the bill's provision that the "time, place and manner" of student assemblies would have to be approved by administrators in advance. Arkansas Press Association members said requiring advance approval of student assemblies gave students fewer, not more, First Amendment rights ("Ohio free expression bill," 1999).

The Ohio Legislature, meanwhile, late this Spring was still considering a bill that would prevent school officials from banning offensive, even racist, speech on public college campuses (Ohlemacher, 2000). The bill, which was passed by the Ohio House and was pending in the state Senate, would prevent public college and university officials from restricting student expression, as long as that expression violates no laws, such as obscenity or incitement to immediate violence. It also would allow students to file suit to stop schools from enforcing speech codes that outlaw hateful or offensive speech (Ohlemacher, 2000).

While the Arkansas bill met an early death and the Ohio legislation is aimed more at speech codes than the student press, both measures highlight some of the inherent problems in enacting student free expression laws. On one hand, legislators who have introduced scholastic freedom of expression laws have found, as have their counterparts in Arkansas, that support from a state press association is not automatic.

Further, even if a legislature were to enact a law protecting freedom of expression at public colleges and universities, the experiences of high school newspaper advisors in states with scholastic freedom of expression laws have shown less than overwhelming support for the efficacy of such laws. In their national

random sample survey of high school newspaper advisors, for instance, Paxton and Dickson (2000) noted that based on written comments that advisors attached to their questionnaire, advisors within a single press law state had radically different interpretations of what the law required of them. Whereas some advisors in a state might see their law as meaning a hands-off approach by the advisor and no censorship, other advisors in the same state saw the law as requiring them to exert pressure on student journalists to withdraw stories or to kill stories that they thought either were not protected by the law or which the law required that they censor. In their earlier study, Dickson and Paxton (1997) also found that state scholastic freedom of expression laws "may be having a detrimental effect on high school press freedom" because the laws in Iowa, Kansas, Colorado and California required high school newspaper advisors to read the student newspaper before publication and act as censor for such things as libel, obscenity, invasion of privacy, and disruption of the school (p. 16).

Admittedly, college students faced with restrictions on expression might be more willing to object to that restriction if they could point to a state college freedom of expression statute. In addition, it could be argued that despite Tinker v. Des Moines, high school administrators have rarely been reluctant to restrict the content of student expression. (As a personal note, this author's experiences as a high school newspaper editor in the 1970s were filled with incidents of censorship by the principal.) At the same time, many public college administrators and newspaper advisors keep a hands-off approach to the student newspaper, acknowledging that the long tradition is that the student press at public colleges and universities enjoy First Amendment protections.

Indeed, previous studies show that college newspaper advisors have on average much more training and experience in journalism than do high school newspaper advisors. Bodle (1996) reported that his national survey of college

newspaper advisors showed that two-thirds had four or more years of professional journalism experience. Kopenhaver and Spielberger (1996) reported that their survey of College Media Advisors membership showed that 82.4 percent had some professional journalism experience and two-thirds reported that their only job duty was advising the campus newspaper. In contrast, Dvorak, Lain and Dickson (1994) reported results of a nationwide survey of secondary school newspaper advisors showing that just 28.2 percent were state-certified in journalism education (p. 99) and just 24.4 percent had some professional media experience (p. 117), and advisors reported spending an average of just seven hours a week advising publications (p. 117).

In addition to differences in advisor background and training, the Hazelwood decision applied only to high school newspapers that are part of the school's curriculum. In contrast, most college newspapers are not part of the curriculum but instead are funded either through student government, receive money from the school's student activities fees, receive direct funding from the school, or are independent and are financed completely through advertising sales or subscriptions (Tenhoff, 1991). This difference would lend support to the argument that college and university student newspapers have a greater tradition of independence and therefore more First Amendment support. But the Kincaid ruling, if allowed to stand, would make many of these distinctions between high school and college newspapers meaningless; under Kincaid, any school funding of a student publication would make that publication subject to censorship.

Regardless of these differences in high school and college newspapers, the reality is that state laws aimed at guaranteeing that high school students have First Amendment rights while publishing student newspapers have not been the panacea that many thought they would be. In fact, even in states with clear scholastic press freedom laws, advisors report that newspapers are still subject to censorship. State

laws created to guarantee that college students enjoy First Amendment rights might be a way to bring to the public eye the problem of censorship on campus. But based on the empirical research into state scholastic freedom of expression laws, it would appear that the Arkansas and Ohio legislation, whatever their outcome, would not necessarily guarantee free expression rights for public college students. Proponents of college freedom of expression rights appear to be misguided if they believe a state statute will prevent censorship of college students in those states.

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